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05-CV-00827-CMP

AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON DEPUTY

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ALEXANDER SERRA, M.D.,

Plaintiff,

v.

CENTER FOR DIAGNOSTIC IMAGING,
INC., a Minnesota corporation; CDI
MANAGEMENT CORP., a Minnesota
corporation; ONEX, INC., a Canadian
corporation; DON JACOBSEN, an individual;
TOM TOMLINSON, an individual; and
ROBERT BAUMGARTNER, an individual,

Defendants.

No. **05-00827 JCC**

VERIFIED COMPLAINT FOR SPECIFIC
PERFORMANCE

I. INTRODUCTION

1. This is an action for specific performance of a single provision of a contract between a physician and a non-physician medical practice management company and its affiliates. A contract between plaintiff Alexander Serra, M.D. (Dr. Serra) and defendant Center for Diagnostic Imaging, Inc. provides generally for disputes between them to be resolved by binding arbitration. However, the contract expressly permits judicial actions for specific performance of provisions of the contract. In October 2004, Dr. Serra alerted CDI to what he believed were instances of fraudulent billing by CDI. In February 2005, Dr. Serra initiated an arbitration between him and defendant CDI. CDI sought by way of counterclaim to remove Dr.

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ORIGINAL



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1 Serra from the practice the parties had created. However, on at 6 p.m. on Friday, April 29, 2005,
 2 after changing the locks on Dr. Serra's practice facility, CDI unilaterally ejected Dr. Serra from
 3 his medical practice effective Sunday, May 1, 2005 at 9 p.m. This action blatantly violated the
 4 provisions of the contract between the parties and is a clear attempt to deprive Dr. Serra of his
 5 livelihood during the pendency of the arbitration. Dr. Serra files this complaint to seek limited
 6 injunctive relief specifically enforcing the removal provisions of the contract, so the arbitration
 7 can proceed with the maintenance of the status quo that existed prior to defendant's illegal "self-
 8 help" actions.

9 II. THE PARTIES

10 2. Plaintiff Alexander Serra, M.D. is an individual who resides in the County of
 11 King in the State of Washington. Dr. Serra is a radiologist licensed in the State of Washington to
 12 practice medicine.

13 3. Defendant Center for Diagnostic Imaging, Inc. is a Minnesota corporation with its
 14 principal place of business in St. Louis Park, Minnesota. On information and belief, Defendant
 15 CDI Management Corp. is a wholly owned subsidiary of CDI. Center for Diagnostic Imaging,
 16 Inc. and CDI Management, Inc. are hereinafter collectively referred to as "CDI." CDI is not in
 17 the business of practicing medicine; instead, it manages physician practices.

18 4. On information and belief, CDI has been acquired by Defendant Onex, Inc.,
 19 ("Onex"), a Canadian corporation. Plaintiff is ignorant of the current corporate status of CDI,
 20 which may be operated as either a subsidiary or division of Onex. On information and belief,
 21 Onex is liable for the matters alleged herein as successor in interest to CDI.

22 5. By an Operating Agreement entered into by Dr. Serra and CDI on or about
 23 September 30, 2001 (a true and correct copy of which is attached hereto as Exhibit A), Dr. Serra
 24 and CDI together formed CDI-Northwest, a limited liability company formed under the laws of
 25 the State of Minnesota. The Operating Agreement was subsequently amended on June 1, 2003
 26

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1 ("First Amendment") and on September 26, 2003 ("Second Amendment"). Copies of the First
 2 and Second Amendments are attached hereto as Exhibits B and C, respectively.

3 6. CDI-Northwest is an independent diagnostic testing facility that began providing
 4 services on approximately December 9, 2001 with mobile MRI. CDI-Northwest attained full
 5 service capabilities on approximately March 10, 2002. It provides MRI, CT and injection
 6 procedures. Dr. Serra is the Medical Director of CDI-Northwest and is an Approved Radiologist
 7 under the terms of the Operating Agreement. CDI and/or its wholly owned subsidiary, CDI
 8 Management Corp. is the Center Manager of CDI-Northwest under the terms of the Operating
 9 Agreement. Dr. Serra owns a 49% interest in CDI-Northwest and CDI owns a 51% interest in
 10 CDI-Northwest. CDI-Northwest is governed by a Board of Governors. There are currently a
 11 total of four Governors on the Board of Governors, three Governors appointed by CDI and one
 12 Governor appointed by Dr. Serra.

13 7. Defendant Don Jacobsen is an individual who resides in the State of Minnesota.
 14 Mr. Jacobsen is a member of the Board of Governors of CDI-Northwest. Mr. Jacobsen was
 15 appointed to the Board of Governors by CDI.

16 8. Defendant Tom Tomlinson is an individual who resides in the State of Minnesota.
 17 Mr. Tomlinson is the Chief Operating Officer of CDI and is a member of the Board of Governors
 18 of CDI-Northwest. Mr. Tomlinson was appointed to the Board of Governors by CDI.

19 9. Defendant Bob Baumgartner is an individual who resides in the State of
 20 Minnesota. Mr. Baumgartner is the Chief Executive Officer of CDI and a member of the Board
 21 of Governors of CDI-Northwest. Mr. Baumgartner was appointed to the Board of Governors by
 22 CDI.

23 III. JURISDICTION AND VENUE

24 10. This Court has subject matter jurisdiction over the claims asserted herein pursuant
 25 to 28 U.S.C. § 1332, as all plaintiffs and all defendants are citizens of different states and the
 26 amount in controversy, exclusive of interest and costs, exceeds \$75,000.

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11. Venue is proper in this District as Dr. Serra resides in this District and the acts and occurrences that give rise to the causes of action set forth herein occurred in the District.

IV. BACKGROUND

12. The Operating Agreement of CDI-Northwest divides certain duties and responsibilities between Dr. Serra and CDI. The Operating Agreement provides that as an Approved Radiologist, Dr. Serra, among other things, provides all of the radiological services for all of the procedures at CDI-Northwest, provides interpretations of medical images, cooperates with the Center Manager in establishing imaging protocols, collects data related to CDI-Northwest and its services, and reviews the business and financial matters of CDI-Northwest. See Ex. A, Operating Agreement, Section 9.2, "Duties of Radiologist." The Operating Agreement provides that, as Medical Director, Dr. Serra is responsible for arranging medical staffing of the CDI-Northwest Center, overseeing the conduct of the procedures performed at the Center, overseeing the purchase and disbursement of pharmacological materials, consulting with the Center Manager regarding the selection, training and supervision of Center personnel, and reviewing with the Center Manager the financial and operational status of the Center. See Ex. A, Operating Agreement, § 9.6, "Duties of Medical Director." The Operating Agreement provides that CDI, as the Center Manager, is responsible for equipment purchasing, leasing and maintenance, licensing of the Center, marketing, billing to third party payors (*i.e.*, the federal government and private insurers), financing, policies and procedures for Center operations, purchasing insurance, and providing accounting services and the like. See Ex. A, Operating Agreement, Section 10.1, "Center Manager, Duties." In addition, the Center Manager was granted a power of attorney to conduct billing. *Id.*, § 10.3.

13. Beginning in the Summer of 2004, Dr. Serra discovered information that suggested that CDI was improperly billing such services to both federally funded and private insurers. In a letter dated September 20, 2004, Dr. Serra gave notice of breach to CDI pursuant to §§ 8.3 and 17.1 of the Operating Agreement. Briefly described, these breaches consist of the



1 following, among others: (a) as Center Manager, CDI billed for therapeutic pain management
 2 services that CDI-Northwest is not authorized under federal law to perform, or bill for, and did
 3 so through the sham of falsely representing that the services were performed by a professional
 4 services organization named Medical Scanning Associates, P.A. ("MSC") when in fact the
 5 services were performed by Dr. Serra, who was authorized to perform such procedures and had
 6 no relationship with MSC at the time; (b) CDI conducted the unauthorized practice of medicine
 7 by permitting a non-physician to read medical imaging, delivering medical services it is not
 8 authorized to deliver, altering Dr. Serra's transcription of services he has performed, and
 9 imposing a "Policy and Procedures Manual" that addresses, often incorrectly, the medical
 10 procedures to be followed by medical personnel; (c) CDI violated patient confidentiality in
 11 derogation of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"); and
 12 (d) CDI failed to adequately manage CDI-Northwest. Each of these breaches exposed Dr. Serra
 13 to potential liability under state and federal law.

14 14. Because CDI failed to cure its breaches within 60 days, Dr. Serra filed an
 15 Arbitration Demand on or about February 15, 2005, a true and correct copy of which is attached
 16 hereto as Exhibit D. Among the relief sought by Dr. Serra was an order relieving him of his non-
 17 compete obligations pursuant to § 8.3 of the Operating Agreement, which provides that CDI's
 18 failure to cure a material breach within 30 days notice of such breach voids the non-compete
 19 provisions contained in § 8.2.1.

20 15. Within six days of Dr. Serra filing his arbitration demand and prior to answering,
 21 CDI provided a "report" to the Board of Governors that purported to be based upon "various
 22 complaints" by unnamed persons and "other evidence." This report "found" that Dr. Serra had
 23 created a threatening work environment, had "threatened" CDI-Northwest personnel, had used
 24 CDI-Northwest facilities for his "personal benefit" to bill his professional services and other
 25 items. The report proposed that Dr. Serra comply with a set of "conduct requirements" which
 26 included, among other things, that "Dr. Serra is not to contact or give orders to any member of



1 the administrative staff unless they relate to the matters of medical care and patient safety"; that
 2 "Dr. Serra will cease to have any contact with patients or gather any information from patients,
 3 including billing information, that is unrelated to the provision of medical advice and services";
 4 and that Dr. Serra "will ... not interfere with the administration or operation of CDI-Northwest."

5 16. The Board of Governors, controlled by CDI, adopted this report and conduct
 6 requirements in a set of resolutions on February 23, 2005. The three Governors who were senior
 7 CDI employees "instructed" CDI to advise Dr. Serra that his conduct may violate the terms of
 8 his agreement and "may violate state and federal laws relating to treatment of employees" and
 9 required Dr. Serra to abide by the "code of conduct" recommended by CDI.

10 17. CDI answered Dr. Serra's demand for arbitration and served counterclaims on or
 11 about March 1, 2005. Among the relief requested by CDI in its response was an order "declaring
 12 that CDI is entitled to terminate Dr. Serra as Medical Director and an Approved Radiologist for
 13 CDI-NW." A true and correct copy of such answer and counterclaims is attached hereto as
 14 Exhibit E.

15 18. Dr. Serra timely appointed an arbitrator to hear the claims pursuant to § 17.12 of
 16 the Operating Agreement. CDI appointed as arbitrator a partner in the law firm that represents
 17 CDI on employee matters. Dr. Serra objected to this appointment and CDI has yet to appoint a
 18 replacement arbitrator. As a consequence, neither the second nor the third arbitrator (who is to
 19 be appointed by the two party-appointed arbitrators) have yet to be appointed, notwithstanding
 20 that Dr. Serra's demand was made over two and half months ago.

21 19. Since the time that the arbitration demand was filed, Dr. Serra has continued to
 22 encounter improper billing and other practices of CDI. These practices include the wholesale
 23 false billing of epidurography services to both federal and private payers. Moreover, despite
 24 representing that it ceased in October 2004 billing Medicare for therapeutic pain management
 25 services performed by Dr. Serra and which CDI was not authorized to either perform or bill for,
 26 CDI continued to bill for these services through at least January 2005. Other issues have also

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1 arisen. In addition, CDI unilaterally changed the informed consent document, which is required
 2 of every patient undergoing an image-guided invasive procedure, to, among other things,
 3 eliminate critical written patient responses to questions pertaining to allergies and bleeding
 4 tendencies. This change was discovered when a patient on Dr. Serra's injection table, with a
 5 five-inch needle positioned on a lumbar nerve root, requested that Dr. Serra cease his work
 6 because the patient was allergic to the contrast medium. In addition, Dr. Serra and a technologist
 7 discovered in a closet at CDI-Northwest the film archives from invasive procedures on 112
 8 patients which had never found their appropriate place in the patients' medical jackets.

9 20. Dr. Serra wrote CDI on or about April 25, 2005 to inform them of a specific
 10 billing impropriety and demand that it cease. This billing impropriety was the unbundling of
 11 epiduragraphy from epidural steroid injections. The appropriate practice in performing and
 12 billing for epidural steroid injections is to bill for a single procedure, one component of which is
 13 epiduragraphy. Instead of billing in this method, CDI unbundles the epiduragraphy from the
 14 epidural steroid injection and bills for both "procedures." This unbundling results in overbillings
 15 to both federally funded and private insurers. A true and correct copy of the letter is attached
 16 hereto as Exhibit F.

17 21. Four days after Dr. Serra sent his letter alerting CDI that he objected to the
 18 continued inappropriate billing of epiduragraphies, CDI recommended that Dr. Serra be removed
 19 as an Approved Radiologist and as Medical Director of CDI-Northwest. This recommendation
 20 came in the form of a memorandum which purported to document unspecified conduct of
 21 Dr. Serra after the Board's resolution directing him to comply with a set of conduct
 22 requirements. The report stated that Dr. Serra had: (1) made disrespectful and abusive
 23 comments to unidentified employees of the Center who became fearful of Dr. Serra;
 24 (2) Dr. Serra communicated to unidentified CDI employees regarding the pending arbitration;
 25 (3) Dr. Serra criticized and failed to speak positively about CDI and the CDI-Northwest Center;
 26 (4) Dr. Serra marketed his medical practice; and (5) Dr. Serra failed to cooperate with CDI. The



1 report concluded that "it is in the best interests of the Center to terminate [Dr. Serra's]
2 employment."

3 22. In connection with its recommendation to remove Dr. Serra as an Approved
4 Radiologist, and after surreptitiously changing the locks on the CDI-Northwest facilities, CDI, at
5 approximately 6:00 p.m. on Friday, April 29, 2005, (1) with a chronic pain patient in the waiting
6 room waiting to see Dr. Serra for procedures, immediately escorted Dr. Serra; (2) an MRI patient
7 on the table being scanned; (3) a pending need for an immediate report on a patient scheduled for
8 the next morning; and (4) over 30 undictated exams from that day, including a heart MRI.

9 FIRST CAUSE OF ACTION

10 FOR SPECIFIC PERFORMANCE OF CONTRACT

11 23. Dr. Serra hereby incorporates by reference paragraphs 1 through 22 above as
12 though fully set forth in this paragraph 23.

13 24. The Operating Agreement is a binding agreement and is supported by adequate
14 consideration.

15 25. Section 17.12 of the Operating Agreement provides that "all disputes relative to
16 interpretation of the provisions of this Agreement or any other dispute arising among the parties"
17 shall be resolved by final and binding arbitration. The Operating Agreement also provides,
18 however, that "[t]he parties will be irreparably damaged in the event that this Agreement is not
19 specifically enforced. Therefore, if any party so required under this Agreement fails to enter into
20 any agreement or take any other action required by this Agreement, then, in any such event, the
21 other party may institute and maintain a proceeding to compel the specific performance of this
22 Agreement. Such remedy, however, shall be cumulative and not exclusive, and shall be in
23 addition to any other remedy at law or in equity that the parties may have." Operating
24 Agreement, § 17.15.

25 26. In connection with reporting to the Board of Governors of CDI its
26 recommendation that Dr. Serra be removed as Medical Director and Approved Radiologist, and



1 in connection with escorting Dr. Serra from the premises and changing the locks on the facilities,
 2 CDI proposed certain resolutions to the Board of Governors of CDI-Northwest. These
 3 resolutions recite that after having put Dr. Serra on warning, the most recent report of CDI
 4 demonstrates that Dr. Serra's actions "(a) violate the terms of Dr. Serra's Agreement with the
 5 Company; (b) have a significant negative impact on the financial performance of the Company;
 6 (c) are in direct violation of his fiduciary duties to the Company; (d) create a possible negative
 7 and hostile work environment for employees at the Center; and (e) put the Company at
 8 significant risk of violation of state and federal laws relating to the treatment of employees."
 9 Based on these findings, the resolutions conclude that "it is in the best interest of the Company to
 10 terminate the services of Dr. Serra as an Approved Radiologist of the Company." A true and
 11 correct copy of the proposed resolutions and the memoranda on which they are purportedly
 12 based are attached hereto as Exhibit G.

13 27. The proposed resolutions removing Dr. Serra as an approved radiologist purport
 14 to be effective on 9:00 p.m. on the evening of Sunday, May 1, 2005. On information and belief,
 15 these resolutions were adopted by the CDI designees on the CDI-Northwest Board of Governors
 16 on or before May 1, 2005.

17 28. Section 9.3 of the Operating Agreement of CDI-Northwest clearly defines the
 18 circumstances under which an Approved Radiologist may be removed from his position as such.
 19 The resolutions purporting to remove Dr. Serra appear to be based upon the *former* provisions of
 20 § 9.3 of the Operating Agreement, which formerly provided that "RADIOLOGISTS [previously
 21 defined to be Dr. Serra and his affiliated practitioners] shall immediately remove any Approved
 22 Radiologist from providing service to the Center upon the occurrence of any one or more of the
 23 following events ... 9.3.6. If the Board believes in good faith that the Approved Radiologist is
 24 not properly fulfilling his or her duties pursuant to this Agreement or that the Approved
 25 Radiologist's continued service to the Center is not in the best interests of the Center." This
 26



1 provision is no longer a part of the Operating Agreement, by virtue of the Second Amendment to
 2 the Operating Agreement.

3 29. Section 9.3 was subsequently amended and modified in its entirety by the parties
 4 on or about September 26, 2003 to state as follows: "The Board may terminate, or direct the
 5 termination of, the services of an Approved Radiologist in the event that the Board determines,
 6 in its reasonable judgment, and after notice to Dr. Serra and to the Approved Radiologist with
 7 reasonable opportunity to respond to that notice and to remedy the notified behavior, that the
 8 *service of the Approved Radiologist do not meet the standards for the performance of*
 9 *professional duties by a radiologist in the geographic area* of the LLC's Centers, in the type of
 10 Center operated by the LLC, according to industry standards for that area at the time." (Ex. C,
 11 emphasis added.)

12 30. The Board of Governor's Resolutions purporting to remove Dr. Serra as an
 13 Approved Radiologist fail to meet any of the relevant criteria under the current § 9.3 of the
 14 Operating Agreement for removal of Dr. Serra. There is no reference in any of those resolutions
 15 to the "standards for the performance of professional duties by a radiologist in the geographic
 16 area of the LLC's Centers, in the type of Center operated by the LLC, according to industry
 17 standards for that area at the time." Instead, the sole basis for removal is the Board's conclusion
 18 that removal would be in the best interests of CDI-Northwest based upon Dr. Serra's alleged
 19 treatment of employees and other administrative matters that may impact on the financial
 20 performance of CDI-Northwest. No aspect of the resolutions removing Dr. Serra address the
 21 professional, medical activities or treatment of patients by Dr. Serra. Nor could there be any
 22 findings that Dr. Serra failed to meet the professional standards for radiologists employed at
 23 Centers like CDI-Northwest in the Seattle area, as Dr. Serra has at all times performed at or
 24 above such standards.

25 31. CDI's purported removal of Dr. Serra, as an Approved Radiologist and as
 26 Medical Director, breach the provisions of § 9.3, as amended. On information and belief, the

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1 articulated basis of Dr. Serra's removal is a pretext for the true purpose, to prevent Dr. Serra
2 from further investigating and challenging CDI's improper billing practices.

3 32. Dr. Serra will be irreparably harmed if he is removed as an Approved Radiologist
4 of CDI-Northwest. Dr. Serra has no alternative facilities to perform medical services. Dr. Serra
5 has spent at least the last four years building his practice, including his relationships with patients
6 and with referring physicians. If Dr. Serra is forced out of practice by his ejection from CDI-
7 Northwest, Dr. Serra will be unable to maintain and sustain his relationships with his patients
8 and his referral base. This loss of continuity will result in a loss of goodwill and damages that
9 are not capable of being ascertained with reasonable certainty. They will also result in an
10 intangible loss to Dr. Serra in the practice of his profession and the personal satisfaction that
11 such a practice provides.

12 WHEREFORE, plaintiff Dr. Serra respectfully prays for the following relief:

13 A. For a temporary restraining order and preliminary and permanent injunction
14 enjoining CDI and Governors appointed by CDI to the Board of Governors of CDI-Northwest, to
15 refrain from the enforcement of the resolutions adopted on May 1 purporting to remove Dr. Serra
16 as an Approved Radiologist and Medical Director of CDI-Northwest and that Dr. Serra be
17 reinstated immediately as an Approved Radiologist and Medical Director of CDI-Northwest until
18 the arbitration now pending between the parties is resolved;

19 B. For an order that CDI be compelled to arbitrate its claims, if any, that it is entitled
20 to remove Dr. Serra as an Approved Radiologist and Medical Director;

21 C. For Dr. Serra's costs of suit incurred herein; and

22 D. For such other and further relief that the Court deems just and proper.

23 DATED: May 3, 2005.

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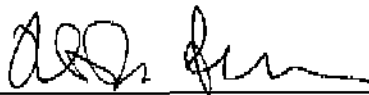
VERIFICATION

I, Dr. Alexander Serra, being first duly sworn, depose and state as follows:

1. I have personal knowledge of the facts stated herein. If sworn as a witness, I would competently testify thereto.
2. I have reviewed the complaint prepared on my behalf against the Center for Diagnostic Imaging, *et al.*, for specific performance. The facts stated therein are true of my own personal knowledge except as to those allegations stated on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury, under the laws of the United States, that the foregoing is true and correct.

DATE: 5/3/05



Dr. Alexander Serra